

Message

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Subject: FW: Article in InsideEPA on ORR Decision- Fyl

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Subject: FW: Article in InsideEPA on ORR Decision

Region 4 found an interesting article about the ORR decision in InsideEPA.

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Subject: Article in InsideEPA on ORR Decision

<https://insideepa.com/daily-news/reversing-stance-wheeler-settles-nuclear-waste-cleanup-fight-doe>

David saw this; I haven't even read it yet. - mb

Reversing Stance, Wheeler Settles Nuclear Waste Cleanup Fight With DOE

January 7, 2021

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EPA Administrator Andrew Wheeler has settled a long-running fight between Region 4 and the Energy Department (DOE) over applying water standards to radionuclides at a Superfund cleanup, setting a precedent by reversing the region's push to impose technology-based effluent limits but backing its push to apply water-quality based standards.

In a 15-page letter sent Dec. 31, Wheeler backed Region 4 and Tennessee's position that water-quality based standards apply as cleanup standards for a landfill discharging wastewater containing radionuclides at DOE's Oak Ridge Reservation (ORR) in Tennessee.

But he agreed to allow DOE-conducted site-specific studies, in lieu of using default exposure assumptions for fish consumption, that will be used to develop site-specific water quality standards for the discharges and a remediation goal.

Further, he set a precedent by rejecting the position held by Region 4 Administrator Mary S. Walker, that strict, technology-based effluent limitations should apply as so-called applicable or relevant and appropriate requirements (ARARs).

At Superfund cleanups, regulators determine which federal or more stringent state standards, dubbed ARARs, apply to a remedial action.

As a general matter, technology-based standards are less flexible than water-quality based standards though any precedent is likely limited to sites with radionuclide contamination.

"I have determined that the regional administrator erred in determining that technology-based effluent limitations under the EPA and Tennessee regulations are relevant and appropriate to discharges of radionuclides from ORR landfills," Wheeler wrote in the letter, which he sent to ORR's environmental management office and Tennessee Department of Environment and Conservation (TDEC) Commissioner David Salyers.

"This letter conveys my final decision resolving the dispute among [EPA, TDEC], and the U.S. Department of Energy regarding the discharge to surface water of wastewaters generated during a response action under the *Comprehensive Environmental Response, Compensation & Liability Act* [(CERCLA)] of 1980..."

Wheeler "was trying to split the baby," one former government official says of the administrator's final decision. The most significant issue in the dispute related to the status of state water standards, rather than the technology-based limits, the source says. Wheeler is agreeing with the state on the issue Tennessee cared most about, the source adds.

Asked about Wheeler's final decision, a TDEC spokeswoman says in a statement the department "appreciates the EPA reaching a decision that will protect Tennessee waters; we also look forward to continuing to work with our federal partners to make progress on the environmental clean-up at the Oak Ridge Reservation while protecting the state's natural resources."

The dispute had Region 4 and TDEC opposing DOE, [disagreeing over](#) what standards and authorities to apply to radioactive discharges of wastewater from an existing landfill and proposed landfill at ORR. Under the federal facilities agreement for the site's cleanup, the EPA administrator is the final arbiter over such disputes.

CERCLA Authority

At issue was whether EPA can invoke its authority under CERCLA to apply strict Clean Water Act (CWA) requirements as ARARs to govern wastewater discharges. In its arguments, Region 4 contended EPA has final authority under section 120(e)(4) of CERCLA to decide remedy selections, including protectiveness levels and ARARs determinations at the Superfund site. The region said that wastewater discharges from the two landfills at ORR must meet a threshold requirement under CERCLA section 121(d) that ensures protectiveness of human health and the environment, noting that no exception exists for radionuclide discharges.

While the region conceded CWA regulations exclude as "pollutants" radioactive materials regulated under the Atomic Energy Act (AEA), and therefore the CWA requirements are not "applicable" to an on-site remedy that includes discharges of AEA materials, it said that such wastewater discharge requirements are still "relevant and

appropriate." It said under CERCLA, it is enough that a requirement is "applicable" or "relevant and appropriate" for it to be an ARAR.

But DOE argued that the cleanup should be governed by weaker requirements under the AEA.

Wheeler in his letter maintains that cleanup levels for discharges of carcinogens from a Superfund site cannot be less stringent than the CERCLA risk range of 1×10^{-4} to 1×10^{-6} , saying he is requiring a risk level here of at least 1×10^{-5} .

He also rejected DOE's argument that because CWA regulations are not "applicable" to AEA materials, they are also not "relevant and appropriate" to the discharge of these materials. "First, the plain language of [Superfund's National Contingency Plan] requires the EPA to consider 'applicable or relevant and appropriate requirements' when identifying preliminary remediation goals [(PRGs)], not applicable and relevant and appropriate requirements," he says. Second, he says that "a limitation on the EPA's authority to regulate under CWA is not a limitation on the EPA's CERCLA authority to respond to releases of hazardous substances."

Accordingly, he says, Region 4, for the purposes of setting PRGs for wastewater discharges from landfills at ORR, "properly applied the [National Contingency Plan (NCP)] factors to determine that the Tennessee and the EPA [National Pollutant Discharge Elimination System] regulations that pertain to water-quality based effluent limitations" and state water quality rules setting designated uses and criteria to protect uses "are relevant and appropriate requirements" here.

But Wheeler reversed Region 4 on its determination that technology-based effluent limits apply. In "exercising the EPA's discretion to identify relevant and appropriate requirements, and through my evaluation of the NCP's eight factors, I have determined that technology-based effluent limitations are not appropriate requirements to apply to a discharge of radionuclides from this CERCLA site," he says. For instance, he rejects the application of the state's antidegradation policy to discharges of radionuclides from the site's landfills, noting that the creek it discharges to is "currently impaired due to [polychlorinated biphenyls] and mercury and is not an outstanding natural resource water."

He says his decision on technology-based standards and antidegradation policies does not reverse existing policy or precedent.

David Moore, a former EPA attorney now with Earth & Water Law, says that many times, a state-requested ARAR is shot down by EPA, and, in this case, there are no promulgated technology-based effluent limits.

He also points to Wheeler's note on NCP Factor 3. Wheeler says Factor 3 requires "consideration of 'the substances regulated by the requirement and the substances found at the CERCLA site,'" but Wheeler notes that the materials are excluded from CWA's regulatory definition of pollutants regulated under the law and therefore consideration of that factor does not support identifying CWA technology-based standards as relevant and appropriate.

Moore says that "is a very strong justification for not including radionuclide technology based limits."

Betsy Southerland, a former EPA water and Superfund official, says, "Wheeler's letter will establish a precedent" unless the incoming Biden EPA develops a rationale for why technology-based standards should apply.

She says that "CERCLA requirements are clear that water quality standards are ARARs but are not clear about technology-based standards. Given this ambiguity Wheeler was able to write that they don't apply."

Exposure Assumptions

Wheeler also decided that the agency will not require using default exposure assumptions from CWA guidance documents for fish consumption to develop PRGs, or any other default exposure assumptions in dispute, such as those for ingestion. He said he agrees with DOE's assertion that site-specific factors are relevant to evaluating the potential for exposure to radionuclides through ingestion.

"Instead of using disputed default assumptions regarding exposures, particularly through fish consumption, the DOE, in applying the relevant and appropriate state and federal CWA regulations and NRC regulations, will establish PRGs for effluent discharge limitations based on site-specific exposure information," he says. He adds, "This approach is consistent with the NCP."

Southerland notes that the remediation goal will rely on site-specific criteria following a DOE fish consumption survey and monitoring work. That will come after the Biden EPA is installed, which could disapprove the criteria and require a different value, she says. -- *Suzanne Yohannan* (syohannan@iwpnews.com)

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If the agency's interpretation deviates from prior policy, the agency must provide a reasoned basis for the change. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).